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No. 1132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

BETTY SOLOMON,

Petitioner,

vs.

LIQUOR CONTROL COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM B. SAXBE,
Attorney General of Ohio,
State House Annex, Columbus, Ohio,
Counsel for Respondent,

JAMES E. RATTAN,
Assistant Attorney General of Ohio,
33 N. Third St., Columbus, Ohio.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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QUESTIONS PRESENTED

1. Is Section 4301.68 of the Ohio Revised Code unconstitutionally vague or uncertain as a basis for revoking an Ohio retail liquor permit?

2. May the State of Ohio, consistent with the Constitution of the United States, require, as a condition of the privilege of carrying on the retail liquor business in Ohio, that such liquor permittees hold their licensed permit premises open to inspection, including the taking of samples of liquor stock therefrom to the state laboratory for chemical analysis, by agents of the Ohio Department of Liquor Control?

STATUTES INVOLVED

OHIO REVISED CODE

§ 4301.10 Powers and duties of department of liquor control.

(A) The department of liquor control shall:

(1) Control the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and sale thereof:

* * * * * * * * *

(4) Enforce Chapters 4301. and 4303. of the Revised Code, and the rules, regulations, and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors; and the attorney general, any prosecuting attorney, and any prosecuting officer of a municipal corporation or a police or municipal court, shall at the request of the department prosecute any person charged with the violation of such chapters or of any section of the Revised Code relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor;

* * * * * * * * *

(6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;

(7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, provided that except in his report to the department

or when called upon to testify in any court or proceeding, no such agent or employee shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or employee, and if he does divulge such information he shall be disqualified forever from acting as agent or in any other capacity under the appointment or employment of the department;

(8) Exercise all other powers expressly or by necessary implication conferred upon the department by Chapters 4301. and 4303. of the Revised Code, and all powers necessary for the exercise or discharge of any power, duty, or function expressly conferred or imposed upon the department by such chapters.

* * * * * * * * *

§ 4301.25 Suspension or revocation of permit.

The board of liquor control may suspend or revoke any permit issued pursuant to Chapters 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule or regulation of the board or other sufficient cause, and for the following causes:

(A) For conviction of the holder or his agent or employee for violating a section of Chapters 4301. and 4303. of the Revised Code or for a felony;

(B) For making any false material statement in an application for a permit;

(C) For assigning, transferring, or pledging a permit contrary to the rules and regulations of the board;

(D) For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise;

(E) For failure of the holder of a permit to pay an excise

tax together with any penalities imposed by the law relating thereto and for violation of any rule or regulation of the department of taxation in pursuance thereof.

* * * * * * * * *

§ 4301.68 Prohibition against sale or possession of diluted liquor and refilled containers.

No person shall sell, offer for sale, or possess intoxicating liquor in any original container which has been diluted, refilled, or partly refilled.

* * * * * * * * *

STATEMENT OF THE CASE

This case originated with a charge before the Ohio Liquor Control Commission that Petitioner had possessed upon her licensed liquor permit premises intoxicating liquor in original containers which had been diluted, refilled, or partially refilled in violation of Section 4301.68 of the Ohio Revised Code. Petitioner made timely objection to the admission before the Commission of certain evidence and testimony relative to several allegedly refilled whiskey bottles (Petition, Appendix E, pp. 31a, 38a) which had been taken without objection from Petitioner's permit premises by state liquor investigators for chemical analysis. Petitioner's motions raising this objection were overruled (Petition, Appendix E, pp. 38a, 40a) and, upon an affirmative finding as to the violation alleged, the Commission ordered Petitioner's Ohio liquor permit revoked.

Petitioner thereafter prosecuted an appeal to the Court of Common Pleas of Franklin County which affirmed the order of the Liquor Control Commission (Petition, Appendix C). On further appeal to the Court of Appeals of Franklin County, however, that court, by a two to one majority, ordered the Liquor Control Commission reversed (Petition, Appendix B). The latter decision was based upon a finding

that the state liquor agents did not have authority under Ohio law to take the bottles of intoxicating liquor, constituting Exhibits A through G, from Petitioner's permit premises (Petition, Appendix B, p. 22a).

Respondent then prosecuted an appeal to the Supreme Court of Ohio, and in a decision announced December 1, 1965, that court unanimously reversed the judgment of the Court of Appeals and affirmed that of the Court of Common Pleas, thereby in effect affirming the order of the Liquor Control Commission revoking Petitioner's Ohio liquor permit (Petition, Appendix A). In so ruling the court held that Section 4301.68, supra, was plain and unambiguous and that, contrary to the finding of the Court of Appeals, the Ohio Liquor Control Act did authorize the removal of bottled intoxicants from a liquor permit premises by state liquor agents for examination and testing in a state laboratory.

Rehearing was denied by the Supreme Court of Ohio, and Petitioner then timely filed the present petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

At the outset, it should be clearly understood that the order of the Ohio Liquor Control Commission, out of which this case arises, deals with nothing but the privilege of conducting the retail liquor business in the State of Ohio under an Ohio liquor permit. The Ohio Liquor Control Commission has power to deal with nothing more (Section 4301.25, Ohio Revised Code); it did not, and could not, order Petitioner put in jail; it did not, and could not, order her fined. The Liquor Control Commission ordered only that Petitioner's privilege of carrying on the retail liquor business in Ohio be revoked; and in the context of the present petition she must now contend, either that the

order itself is in violation of her rights under the United States Constitution, or that the order was obtained in violation of such rights. Beyond those two contentions no federal question of any kind can be presented.

The Ohio Liquor Control Commission is authorized by Section 4301.25, supra, to revoke or suspend Ohio liquor permits for, among others, "violation of any applicable restriction of Chapter 4301." of the Ohio Revised Code. Section 4301.68 of the Ohio Revised Code clearly contains such an applicable restriction, and upon a finding that Petitioner had violated such restriction the Commission ordered her Ohio liquor permit revoked.

1. Section 4301.68 of the Ohio Revised Code is not unconstitutionally vague or uncertain.

Petitioner contends that Section 4301.68, supra, is so vague, indefinite, and uncertain as to deprive her of her rights of due process under the Fourteenth Amendment to the United States Constitution. Since under Ohio law a liquor permit is neither life, liberty, nor property (*State, ex rel. Zugravu v. O'brien*, 130 Ohio St., 23 (1935)), it might be doubted that due process requirements of definiteness and certainty necessarily apply in this case. Assuming for the purposes of argument that they do, however, Petitioner's contention is still without merit. On its face the statute in question is neither vague, nor indefinite, nor uncertain. Far from requiring a man of common intelligence to guess at its meaning, it takes a man of uncommon intelligence and determination to conjure up even an unsubstantial question about this statute.

Section 4301.68, Ohio Revised Code, provides:

> "No person shall sell, offer for sale or possess intoxicating liquor in any original container which has been diluted, refilled, or partially refilled."

Whatever else may be said about this language, it must at

least be deemed to clearly convey that possession of whiskey bottles containing intoxicating liquor, other than that indicated by the label in undiluted form, by an Ohio liquor permit holder upon her licensed premises, will subject that permit holder to the risk of having her liquor permit suspended or revoked by the Liquor Control Commission under authority of Section 4301.25, supra. The most that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ." (*United States v. Petrillo,* 332 U. S. 1, 7, 8 (1947), *Roth v. United States,* 354 U. S. 476, 491 (1957)) As to the Petitioner, certainly that much is conveyed by the statutory language here in question.

The arguments in the Petition based on the fact that violation of Section 4301.68, supra, is also a misdemeanor and the fact that the prohibition of the section might be applied to every person in the State of Ohio are inapposite. No criminal penalty is being imposed here, and the statute is being applied only to one of a special and limited class of persons, viz., Ohio liquor permit holders. The Court does not "decide any constitutional question except with reference to the particular facts to which it is to be applied . . ." (*Alabama State Federation of Labor v. McAdory,* 325 U. S. 450, 461 (1945)). The facts with reference to which the Constitutional question would be decided here are revocation of a state liquor permit for possession by the permit holder of refilled whiskey bottles on the liquor permit premises; and, as to that set of facts, there is no lack of certainty in the statute whatever.

2. The State of Ohio may, consistent with the Constitution of the United States, require, as a condition of the privilege of carrying on the retail liquor business in the

state, that such liquor permittees hold their licensed permit premises open to the type of inspection carried out in this case.

There is in the Petition a concerted effort to convince the court that the question of whether the exclusionary evidence rule of *Mapp v. Ohio,* 367 U. S. 643 (1961), is applicable to state administrative proceedings is presented by this case. In fact and despite Petitioner's use of phrases such as "highhanded manner", "official lawlessness", and "flagrant abuse", that question is not presented here.

The key portion of the holding of the Ohio Supreme Court on this point is contained in Syllabus No. 4 to the court's opinion.

> "One who applies for and is issued a permit to sell intoxicating beverages thereby subjects himself to the provisions of the Liquor Control Act and assents to the reasonably exercised inspection and examination by the agents of the Department of Liquor Control of his permit premises, including bottled intoxicants which he possesses and offers for sale thereon, and a removal of bottles of intoxicants from the permit premises by such agents for examination and testing in a state laboratory to determine whether they comply with lawful requirements is authorized by the provisions of the Liquor Control Act." (4 Ohio St. 2d 31)

That is the highest court of Ohio speaking as to the meaning of an Ohio statute, the Ohio Liquor Control Act and especially Section 4301.10 of the Ohio Revised Code (see Syllabus No. 2). Such construction of the Ohio statute is binding upon this Court (*United States v. Burnison,* 339 U. S. 87 (1950); *Oklahoma Tax Commission v. Texas Company,* 336 U. S. 342 (1949); *Kingsley International Pictures Corp. v. Regents of University of New York State,* 360 U. S. 684 (1959); *National Asso. for Advancement of Colored People v. Button,* 371 U. S. 415 (1963)). In effect, the

Ohio Supreme Court has said that it is a statutory condition of holding an Ohio liquor permit that the permittee agree to reasonable inspection and examination of his permit premises, including the removal of bottled intoxicants therefrom for testing in the state laboratory which was carried out in this case. Unless there is a substantial question whether Ohio may, consistent with the Constitution of the United States, have such a law, there is nothing for this Court to review; for, with the exception of the insubstantial one discussed above, Petitioner's case presents no other question.

It has long been settled that ". . . on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has the power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment." (*Crane v. Campbell,* 245 U. S. 305, 307 (1917)). "Having the power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants . . ." a state may permit these things only under definitely prescribed conditions. "The greater power includes the less . . . The state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." (*Ziffrin v. Reeves,* 308 U. S. 133, 138, 139 (1939))

In the present case the State of Ohio has deemed it in the interest of her people to require that those places licensed to sell intoxicants be open to the type of inspection carried out here. The Supreme Court of Ohio has so interpreted the Ohio law. Petitioner argues strenuously that this is an invasion of her Constitutional rights, but it is not. She has no Constitutional right to carry on the liquor business

(*Giozza v. Tiernan*, 148 U. S. 657 (1893)); she can, therefore, hardly have a Constitutional right to carry it on free from inspection.

Nothing is in jeopardy here but the privilege of Petitioner's Ohio liquor permit—not her life, nor her liberty, nor her property. Furthermore, the right of inspection which the state acquired when Petitioner obtained her permit in no way infringes her Constitutional rights, for it extends only to Petitioner's licensed permit premises and the things thereon—not to her home, nor her car, nor her person. The present case deals with nothing more than the privileges of a state liquor license; and the statutory right of inspection, here producing the evidence upon which that privilege was terminated, extended no further than the site where the privilege was then being exercised. Such a state of facts discloses no invasion of the Constitutional rights of Petitioner.

CONCLUSION

Petitioner's case presents no federal question of substance for review by this Court. The writ prayed for should, therefore, be denied.

Respectfully submitted,

WILLIAM B. SAXBE,
Attorney General of Ohio,
Counsel for Respondent.

JAMES E. RATTAN,
Assistant Attorney General,